

CANADA / JUDGMENT

## McDougall v. Ryan

2024 BCSC 1562

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Supreme Court of British Columbia

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2024 BCSC 1562 McDougall v. Ryan

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

McDougall v. Ryan,

2024 BCSC 1562

Date: 20240826

Docket: E61407

Registry: New Westminster

Between:

Tarra Ann Margert McDougall

Claimant

And

Jonathan Towner Ryan

Respondent

Before: The Honourable Mr. Justice Taylor

Reasons for Judgment

Counsel for the Claimant:

D. Halkett

The Respondent, appearing on own behalf:

J.T. Ryan

**Place and Dates of Trial:**

Port Coquitlam, B.C.

April 2-5; 8-10, 2024

May 29-30, 2024

**Place and Date of Judgment:**

New Westminster, B.C.

August 26, 2024

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**I. Introduction**

- [1] In this family law trial, the principal issues were whether the parties should be divorced, how parenting time and parental responsibilities should be allocated, whether any conduct order should be made, how family property and debt should be divided, and whether retroactive and prospective child support is payable.

**II. Background**

- [2] The claimant, Tarrah Ann Margert McDougall, and the respondent, Jonathan Towner Ryan, met in 2009, commenced a marriage-like relationship on or about October 26, 2011 and were married on April 14, 2012. They were separated on or about July 1, 2014 (the "Separation Date").

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- [3] Mr. Ryan is an American citizen and was residing in Seattle, Washington when the parties met. Ms. McDougall is a Canadian citizen and was living in Abbotsford, British Columbia at that time.
- [4] The parties have three children: Brighton Dean Towner Ryan, born October 26, 2011 ("Brighton") and twins Lachden Kenneth Ryan ("Lachden") and Avielle Ann Ryan ("Avielle") born April 29, 2013 (collectively the "Children").
- [5] Mr. Ryan is trained and has worked as a full-stack software engineer, although recently left his employment and is looking for a new job. He currently resides in Ferndale, Washington.
- [6] Ms. McDougall is trained and works as a dental hygienist. She currently resides in Maple Ridge, British Columbia.
- [7] During the course of their marriage, Mr. Ryan was employed in a variety of positions in the engineering and software fields and also operated a climbing-oriented website as a sideline venture. Ms. McDougall, who had been working full-time as a dental hygienist prior to meeting Mr. Ryan, ceased working after the birth of Brighton and thereafter stayed home to care for the Children during the marriage. She has subsequently resumed work as a dental hygienist on a temporary, but not full-time, basis.
- [8] Prior to the commencement of the relationship with Mr. Ryan, Ms. McDougall had purchased a strata property at #113 - 2990 Boulder St. in Abbotsford, British Columbia (the "Strata Property"). The Strata Property was purchased by Ms. McDougall for \$227,900 on October 27, 2007, with a mortgage in the amount of \$236,631.
- [9] Mr. Ryan adduced limited evidence at trial concerning his assets and debts at the time he met Ms. McDougall (or thereafter), apart from information he declared in his Financial Statement, which included a vehicle and certain banking and investment accounts. Mr. Ryan does not own real estate and rents his home in Ferndale.
- [10] During the course of their relatively brief marriage, Mr. Ryan continued to work in the United States and travelled back and forth between Washington State and British Columbia. When he was in Canada, he resided with Ms. McDougall at the Strata Property.
- [11] Mr. Ryan obtained temporary residence status in Canada during the course of their relationship and applied for permanent residence status in Canada prior to the Separation Date. However, this application was denied in February 2014 in large part because Mr. Ryan had not disclosed to Citizenship and Immigration Canada (now Immigration, Refugees and Citizenship Canada) that he had a son in the United States from a prior relationship, named Riley John Walgamott.

- [12] Following the denial of his permanent residence application, Mr. Ryan's temporary resident status was also revoked and he was required by Citizenship and Immigration Canada to leave Canada no later than May 28, 2014, which he did. Subsequent to that time, Mr. Ryan has been able periodically to obtain special permission to enter and leave Canada, but has had no temporary or permanent residency status.
- [13] In August 2015, about a year after the Separation Date, the parties attended a mediation with the intention of resolving all outstanding matters relating to their separation, including guardianship, parenting time, child and spousal maintenance and division of property. The mediation resulted in a draft Memorandum of Understanding (the "Draft MOU") being prepared by the mediator and circulated to the parties. However, despite a subsequent exchange of correspondence between the parties with respect to finalizing the terms of a written separation agreement, the Draft MOU was never subsequently signed.
- [14] An issue at trial was whether the Draft MOU was admissible as evidence of an oral or written agreement between the parties or whether it was inadmissible in whole or in part due to settlement privilege. I will address that issue more fully below.
- [15] Since August 2015 (and with the exception of the Covid pandemic period, where the parties had to make significant adjustments, and one other short period of approximately two months) the parties have consistently shared parenting time in accordance with an orally agreed schedule whereby Ms. McDougall would have the Children from 8:30 a.m. Monday until Friday at 8:30 a.m. and Mr. Ryan would have them from 8:30 a.m. on Friday morning (picking them up after school on school days) until 9 a.m. Monday. The parties have also roughly split holiday and summer break time on a week-on and week-off basis.
- [16] Despite this consistent parenting time arrangement, there have been numerous disputes between Ms. McDougall and Mr. Ryan since the Separation Date with respect to many parenting issues, including disagreements concerning variations of parenting time, pick-up and drop-off arrangements, decisions relating to education and medical care, s. 7 expenses and others. It was evident from the testimony at trial that the parties have had a great deal of difficulty communicating in a productive and cooperative manner, with each citing several examples of alleged confrontational or obstructive behaviour on the part of the other.
- [17] Between August 2015 and August 2018 Mr. Ryan made voluntary blended spousal and child support payments to Ms. McDougall in the amount of \$2,400 monthly. Ms. McDougall alleged that these payments were agreed pursuant to the Draft MOU, while admitting that the specific monthly amount was slightly different than the amount specified under the Draft MOU. Mr. Ryan alleged that the payments were made pursuant to a separate oral agreement and not the Draft MOU, which was never finalized.

- [18] Mr. Ryan stopped paying spousal support altogether in August 2018 but continued to make voluntary regular child support payments until December 2018. Thereafter the child support payments became irregular. Ms. McDougall adduced evidence that Mr. Ryan has paid a total of \$23,198.97 in combined child support and s. 7 expenses since December 2018 up to the date of trial. The evidence, unopposed by Mr. Ryan, was that Mr. Ryan paid child support as follows:
- a) none in 2019;
  - b) \$14,263.62 in 2020;
  - c) \$352.39 in 2021;
  - d) \$2,239.99 in 2022;
  - e) \$5,079.87 in 2023; and \$1,263.10 in 2024.
- [19] Ms. McDougall filed a notice of family claim on August 24, 2018. Mr. Ryan filed a response and counterclaim October 11, 2018.
- [20] After the onset of the Covid pandemic in 2020, Mr. Ryan was unable to exercise his regular parenting time due to border restrictions, and was only able to see the Children for very brief periods during the pandemic. As a result, the Children lived full-time with Ms. McDougall from March 2020 through until May 2021. During the late 2020 and early 2021 timeframe, there was a dispute between the parties as to when and to what extent Mr. Ryan could resume his regular parenting time. Ultimately, pursuant to an order of Master Keighley dated April 28, 2021 (the "Keighley Order"), the parties resumed the prior schedule of three weekend days for Mr. Ryan and four weekdays for Ms. McDougall. The parties have continued to operate under that schedule up until the date of trial.
- [21] The Covid pandemic also impacted upon the child support arrangements. After the commencement of the pandemic in 2020, Mr. Ryan voluntarily restarted making child support payments, which he had discontinued in 2019, although these payments tailed off in late 2020 to virtually nil in 2021. By interim consent order of Justice Groves dated October 6, 2020 (the "Groves Order"), Mr. Ryan was to pay the monthly sum of \$1,805.00 in child support beginning October 11, 2020 for as long as he was not able to exercise the three consecutive days of parenting time. Mr. Ryan made three payments pursuant to the Groves Order and then stopped making child support payments under that order.
- [22] Mr. Ryan also voluntarily made payments of \$782.00 per month from September 2023 through January 2024, although he did not explain to Ms. McDougall at the time how these amounts were calculated. At trial, he asserted that he calculated these payments based upon an assumption of \$120,000 in imputed income to Ms. McDougall, although he did not clearly explain why he discontinued them after January 2024.

[23] In 2021, due to Mr. Ryan's cessation of child support payments, Ms. McDougall applied to the BC Family Maintenance Agency ("BCFMA") for enforcement of child support arrears. The BCFMA ultimately was successful in registering the Groves Order in Washington State, resulting in the garnishment of certain of the child support arrears from Mr. Ryan's wages. Mr. Ryan appealed the registration of the Groves Order to a judge of the Washington State Office of Administrative Hearings at a hearing commencing November 18, 2021 but was unsuccessful, and the registration was affirmed.

[24] As of the date of trial, Mr. Ryan had ceased making any voluntary child support payments.

### III. Issues

[25] The issues at trial were:

1. whether the parties should be divorced;
2. how parenting time and parental responsibilities should be allocated;
3. whether any conduct orders are appropriate;
4. whether Mr. Ryan should pay retroactive and/or prospective child support to Ms. McDougall; and
5. how property and debts should be divided.

### IV. Analysis

1. Whether the Parties should be Divorced

[26] The parties seek an uncontested divorce under s. 8(1) of the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.) [DA]. The relevant requirements as set out in ss. 8(1)-(2)(a) of the DA are as follows:

#### Divorce

8 (1) A court of competent jurisdiction may, on application by either or both spouses, grant a divorce to the spouse or spouses on the ground that there has been a breakdown of their marriage.

(2) Breakdown of a marriage is established only if

- (a) the spouses have lived separate and apart for at least one year immediately preceding the determination of the divorce proceeding and were living separate and apart at the commencement of the proceeding;

[27] I am satisfied on the evidence that there has been a "breakdown of their marriage", specifically due to the parties having lived separate and apart since the Separation Date (or the fall of 2015 at the latest when Mr. Ryan ceased residing at the Strata Property) up to and including the commencement of the trial.

[28] Under s. 10(1) of the DA, I must satisfy myself that there is no possibility of the reconciliation of the spouses before granting the divorce sought. Both parties stated at trial that there is in their opinion no possibility of reconciliation. This was confirmed in my view by their comportment towards each other at trial and in the evidence introduced at trial with respect to their prior difficulties in communicating civilly with each other. The evidence was also that Ms. McDougall is presently in a live-in relationship with a different partner, Andrew Whitaker. I am accordingly satisfied that there is no possibility of reconciliation in this case.

[29] Finally, I find that there has been no improper collusion in bringing this application for divorce, pursuant to s. 11(1)(a) of the DA.

[30] On the basis of the foregoing, I conclude that there should be an order of divorce which will take effect 31 days from the date of this judgment.

## 2. Parenting Time and Parental Responsibilities

[31] I intend to make parenting orders in this case under the Family Law Act, S.B.C. 2011, c. 25 [FLA]. As noted by Justice Douglas in *S.K. v. S.M.*, 2021 BCSC 241, the doctrine of paramountcy with respect to the DA is not engaged in this context:

[44] In making a custody order under s. 16 of the DA, the court's only consideration is the best interests of the child of the marriage (s.16(8)). The test for considering the "best interests" of a child is set out in *Gordon v. Goertz*, 1996 CanLII 191 (SCC), [1996] 2 S.C.R. 27 and *Orring v. Orring*, 2006 BCCA 523. Section 40 of the FLA governs the allocation of parenting responsibilities. Pursuant to s. 41 of the FLA, a court may allocate parenting responsibilities to one parent entirely, apportion them equally between both parents, or assign them specifically to each parent. The parties may also share parenting responsibilities equally pursuant to the Joyce model of guardianship.

[45] Section 37(2) of the FLA sets out the factors relevant to a court's consideration of the child's best interests.

[46] As noted by Justice Sewell in *B.D.M.*, at para. 94, the practical issue that arises from the overlapping provisions of the DA and the FLA is that, while parenting responsibilities can be allocated among guardians under the FLA, the authorities suggest that a custodial parent cannot have his or her powers similarly limited. In *B.D.M.*, at para. 112, Sewell J. decided that defining parental responsibility within the rubric of custody would cause further discord and strife between the parties and not promote the child's best interests. Accordingly, he recognised both parents as guardians who had the right to be consulted about important parenting matters but held that one parent must have final decision-making authority.

- [47] I adopt that approach here. The underlying objectives of s. 16(8) of the DA and s. 37(1) of the FLA are identical; both require the court to consider the best interests of the Child in determining parental responsibility: B.D.M., at para. 115. The doctrine of paramountcy is not engaged: B.D.M., at paras. 113-115.
- [32] It is common ground between the parties that guardianship of the Children should be shared moving forward, pursuant to s. 39 of FLA. I see no reason to order otherwise. The evidence was clear that both parents are responsible and make the best interests of the Children a priority, despite their disagreements on many parenting decisions.
- [33] The parties also seek orders with respect to parenting time and parental responsibilities pursuant to ss. 40 to 45 of the FLA, which I will address in turn.

### Parenting Time

- [34] Since the Separation Date, with relatively short exceptions, the parties have parented under a 3-4 arrangement, with Ms. McDougall having parenting time from Monday morning to Friday morning and Mr. Ryan having parenting time from Friday morning to Monday morning.
- [35] Both parties agreed at trial that a modification to this parenting arrangement is desirable moving forward.
- [36] Ms. McDougall proposes alternating weeks with a changeover being on Wednesdays of each week. Mr. Ryan proposes a 2-2-5-5 arrangement. Mr. Ryan indicated that he is not necessarily opposed to a week-on, week-off arrangement but specified that he would prefer to transition later to that arrangement, when the Children are older.
- [37] Ms. McDougall proposes that holidays be allocated on the same week-on week-off basis as previously. She further proposes that the ten-week summer vacation be divided equally, with each parent having a four-week block with the children, which will permit longer family trips, and the remainder being shared week-on week-off. Mr. Ryan expressed reservation that a four-week block period might be too long for each parent to be separated from the Children.
- [38] In resolving the issue of parenting time, the sole question to be considered is which arrangement is in the best interests of the Children. Unfortunately, for costs reasons, neither a s. 211 report nor a Views of the Child report was prepared by the parties. During the course of the trial I offered to conduct a judicial interview of the Children but both parties declined. Accordingly I must base my decision on the best evidence available, which is the testimony of the parents and the other witnesses.
- [39] It was apparent from the testimony that both parties are committed and caring parents and seek the best for their Children. Unfortunately, it is also apparent the parties have had a great deal of difficulty since the Separation Date communicating productively and often civilly with each other concerning parenting time decisions and parental decisions

generally. Often, disagreements have arisen at times when the Children were being transferred from one parent to the other. Sadly, the testimony also revealed that there have been several instances of the parties engaging in open conflict and disagreement in front of the Children, often at pick-up or drop-off times. Each party blames the other but the allocation of blame is not the ultimate issue here. The issue is how the parenting regime can be improved to minimize conflict between the parents and disruption and potential upset for the Children.

- [40] In my view the week-on week-off parenting arrangement is in the best interests of the Children at this time, and therefore preferable to the 2-2-5-5, because it reduces the number of pick-ups and drop-offs and simplifies the schedule and travel obligations for the Children. To the extent that each pick-up and drop-off requires the Children to cross the border and involves an element of dislocation moving from one house to another, it is desirable that this be kept to a minimum. Further, a reduction in pick-ups and drop-offs will also reduce opportunities for open conflict between the parents in front of the Children. While it is true that the week-on week-off arrangement requires the Children to spend longer periods away from each parent, the Children are now older (11 and 13) and are more likely able to manage longer periods of absence from each parent. At the same time, the reduction in dislocation will enable the Children to spend less time travelling and more consistent time engaging in scheduled activities and developing stable friendships in both Canada and the United States.
- [41] To ensure that regular parental contact is maintained during weeks away, I order that neither party prevent the Children from communicating with the other parent by telephone or electronically while the Children are in their care. I understand that the Children have access to electronic communication devices, which should facilitate compliance with this order.
- [42] It is also my view that pick-ups and drop-offs should take place on Mondays at 8:30 a.m. rather than Wednesdays as proposed by Ms. McDougall, as this will minimize disruption for the Children during the middle of school weeks. It is preferable in my view that parenting time be synchronized with school weeks.
- [43] With respect to vacation time during the school year, my conclusion is that holidays should be shared on a week-on, week-off basis, which maintains consistency with the regular schedule. To the extent that there is conflict about which weeks over Christmas and Spring Break should be allocated to which parent, the weeks can be alternated every year unless the parties agree otherwise. In the 2024-2025 school year, Mr. Ryan will have the first week of Christmas and Spring Break and Ms. McDougall will have the second. In the following year the order will be reversed, and alternated thereafter.
- [44] With respect to summer break, it is in my view in the best interests of the Children that they be given the opportunity to spend a longer period of time with each parent over the summer to enable trips and family visits. Ms. McDougall suggests four weeks for each parent but Mr. Ryan expresses concern this may be too long for the Children to be away from the other

parent. A suitable compromise is to give each parent a three-week block of time with the Children over the summer with the remaining four weeks being alternated on a week-on, week-off basis. If there is conflict over scheduling the three-week blocks, then priority for one parent's scheduling preference will be alternated on an annual basis, with the parents being required to communicate their scheduling preference to each other no later than April 1 of each year. Ms. McDougall will have the first choice during the summer of 2025 and Mr. Ryan will have the first choice in the summer of 2026, with first choice alternating thereafter.

### Parental Responsibilities

- [45] With respect to parental responsibilities, my view is that it is in the best interests of the Children that they be shared equally, as both parties are active and concerned parents with strong relationships with the Children. However, the problem in this case is that the parties have had great difficulty agreeing on certain parental decisions, resulting in open conflict at times and a paralysis in decision-making. This is not in the best interests of the Children, particularly as it relates to important matters such as medical care and schooling.
- [46] To address the issue of decision-making paralysis, my view is that the parties should make reasonable efforts to agree on all parental decisions. If they are unable to agree after a good faith attempt, my view is that Ms. McDougall should have the discretion to make the final decision. While Mr. Ryan is a good parent, the evidence at trial was that Ms. McDougall has since the birth of the Children been the parent with primary childcare responsibilities, including scheduling medical and dental appointments and attending parent-teacher meetings. It is also relevant in my view that the Children are primarily resident in Canada, where they go to school, and thus Ms. McDougall as a resident of Canada is best placed to make timely decisions about their well-being and implement those decisions without delay. If Mr. Ryan disagrees with any decision made by Ms. McDougall, after a good faith attempt at agreement, he will be at liberty to bring an application to court for a review of such a decision.
- [47] There shall also be an order that both parties must reasonably cooperate in ensuring that essential applications for the Children (such as passport and health-related applications) are completed in a timely manner. Mr. Ryan seeks an order requiring Ms. McDougall to consent to a process whereby the Children apply to become United States citizens. In my view there was insufficient evidence adduced at trial concerning whether such an application is in the best interests of the Children. It is a significant decision and the parties should make best efforts to reach a consensual decision on a path forward, without the intervention of a court at this stage. In the event the parties are unable to agree on a course of action, Mr. Ryan shall of course be at liberty to bring an application to court on that issue.

### 3. Conduct Orders

[48] The parties have also sought and agreed upon the following mutually applicable conduct orders, pursuant to ss. 222, 225 and 227(c) of the FLA:

- a) Each party will have reasonable telephone and/or electronic communication with the Children while they are in the care of the other party;
- b) The parties will:
  - i. put the best interests of the Children before their own interests;
  - ii. encourage the Children to have a good relationship with the other parent and speak to the Children about the other parent and that parent's partner in a positive and respectful manner; and
  - iii. make a real effort to maintain polite, respectful communications with each other, refraining from any negative or hostile criticism, communication or argument in front of the Children.
- c) The parties will not:
  - i. question the Children about the other parent or time spent with the other parent beyond simple conversational questions;
  - ii. discuss with the Children any inappropriate adult, court or legal matters; or
  - iii. blame, criticize or disparage the other parent to the Children.
- d) Each party will sign a general written authorization for the other party to travel with the Children. In advance of any travel, that party will provide the other party with a travel itinerary, contact addresses, telephone numbers and evidence of reasonable travel medical/health insurance coverage obtained for the Children for the duration of the trip.
- e) During pickup and drop off, the parties will not interfere with the choice of the Children with respect to possessions they wish to move from one residence to the other.

[49] Both parties made allegations against the other concerning certain alleged confrontational conduct, and withholding of the Children, but in my view there was insufficient evidence adduced at trial to justify a finding of clear fault against either party necessitating a further order at this time. Ultimately, both parties share responsibility for their inability to communicate in a productive manner in the best interest of the Children.

#### 4. Child Support

[50] Ms. McDougall seeks retroactive child support to December 2018 and prospective child support beginning June 1, 2024.

- [51] The Federal Child Support Guidelines, SOR/1997-175 [Guidelines] apply to the child support issues at hand. Under their 3-4 parenting time split, the parties have consistently been and remain in a shared parenting time arrangement under ss. 8-9 of the Guidelines, as Mr. Ryan has had in excess of 40% of parenting time (with the exception of the Covid period for which an adjustment must be made due to the children residing solely with Ms. McDougall).
- [52] Mr. Ryan does not dispute that retroactive support should be payable back to December 2018 or that prospective child support is also payable. However, he disputes the amount of the child support on the basis that Ms. McDougall should have income imputed to her in the amount of \$120,000 dating back to 2018 and prospectively.
- [53] Ms. McDougall accepts that an amount of \$50,000.00 should be imputed to her on a prospective basis but takes the position that there should be no income imputed to her retroactively.
- [54] I will first address the issue of retroactive child support and then address prospective child support.

### Retroactive Child Support

- [55] In *D.B.S. v. S.R.G.*, 2006 SCC 37, the Supreme Court of Canada discussed the factors that a court must consider in making a retroactive award. These four factors are:
1. Reasonable Excuse for Why Support Was Not Sought Earlier;
  2. Conduct of the Payor Parent;
  3. Circumstances of the Child;
  4. Hardship Occasioned by a Retroactive Award.
- [56] With respect to the first factor, I note that Ms. McDougall filed a notice of family claim on August 24, 2018, and now seeks retroactive support back to December 2018, which is actually a date after the notice of family claim was filed. Thus, there is no issue of delay at all here (or a resulting need for an excuse), and this is not disputed by Mr. Ryan.
- [57] With respect to the second factor, there was clearly blameworthy conduct on the part of Mr. Ryan dating back to the end of 2018 based upon his unilateral decision to discontinue child support payments completely in 2019, and then to limit the payments thereafter at his sole discretion. Mr. Ryan testified that he did so based upon "legal advice" and his own assessment at the time that income should be imputed to Ms. McDougall. However, he also made that decision without bringing an application to a court, with the result that his unilateral action had no valid legal underpinning and amounted to self-help. As noted in *L.J.P. v. R.S.L.G.*, 2020 BCSC 1594 at para. 32, citing *Brazeau v. Lejambe*, 2020 ONSC 3117, the courts do not look favourably upon self-help:

it was incumbent upon the mother to bring an urgent motion to address her concerns. She did not. Instead, the mother chose to engage in unilateral self-help by simply disregarding the court-ordered terms and imposing her own will. Courts do not look favourably upon self-help actions of litigants.

- [58] Ultimately, almost two years later, Mr. Ryan did bring an application in 2020 resulting in the Groves Order but this interim without prejudice order dealt solely with the issue of the impact of the Covid pandemic on parenting time and did not address the issue of underlying entitlement to child support from 2018 up to the date of trial, nor the issue of imputed income.
- [59] With respect to the third factor, circumstances of the parties, my view is that a retroactive order is appropriate given the amount of expense, effort, and stress that Ms. McDougall has had to incur to get Mr. Ryan to comply with his obligations, including obtaining an order for enforcement in British Columbia and Washington State and commencing this proceeding.
- [60] Finally, with respect to the fourth D.B.S. factor, I note that Mr. Ryan adduced no evidence that a retroactive award would occasion any hardship for him and, indeed, stated at trial that he expected that a retroactive payment would be forthcoming and fair (although at a lower amount than sought by Ms. McDougall).
- [61] The next question to be addressed is the date from which the retroactive support ought to have been awarded. The Court of Appeal in *Reis v. Bucholtz*, 2010 BCCA 115 at paras. 77-79 explained that this issue should be addressed with reference to the date of effective notice:
- [77] The remaining issue is the date from which retroactive support ought to have been awarded. In D.B.S., the date that was favoured was the date at which "effective notice" was given. Such "effective notice" was said, at para. 121, to include any "any indication by the recipient parent that child support should be paid, or if it already is, that the current amount of child support needs to be re-negotiated".
- [79] The Supreme Court in D.B.S. also indicated that, in general, retroactive support should not reach back more than 3 years prior to the date of formal legal notice that support is being claimed. Again, however, blameworthy conduct can constitute a reason to reach further back: D.B.S. at para. 124; *de Rooy v. Bergstrom*, 2010 BCCA 5, [2010] B.C.J. No. 8 at para. 55.
- [62] In this case, formal legal notice (the notice of family claim) was given on August 24, 2018. Making spousal support payable retroactively to December 1, 2018, a date four months after the filing of the notice of family claim, is clearly appropriate in my view as it does not even necessitate the three-year reach-back period identified by the Supreme Court of Canada in D.B.S.
- [63] I next turn to the issue of the appropriate retroactive amount payable, taking into account any alleged imputed income.
- [64] Section 19(1) of the Guidelines provides that:

19 (1) The court may impute such amount of income to a spouse as it considers appropriate in the circumstances, which circumstances include the following:

- (a) the spouse is intentionally under-employed or unemployed, other than where the under-employment or unemployment is required by the needs of a child of the marriage or any child under the age of majority or by the reasonable educational or health needs of the spouse;
- (b) the spouse is exempt from paying federal or provincial income tax;
- (c) the spouse lives in a country that has effective rates of income tax that are significantly lower than those in Canada;
- (d) it appears that income has been diverted which would affect the level of child support to be determined under these Guidelines;
- (e) the spouse's property is not reasonably utilized to generate income;
- (f) the spouse has failed to provide income information when under a legal obligation to do so;
- (g) the spouse unreasonably deducts expenses from income;
- (h) the spouse derives a significant portion of income from dividends, capital gains or other sources that are taxed at a lower rate than employment or business income or that are exempt from tax; and
- (i) the spouse is a beneficiary under a trust and is or will be in receipt of income or other benefits from the trust.

[65] Mr. Ryan's actual income since 2018, which was not disputed at trial, has been as follows (Canadian dollar equivalent based on the average exchange rate during each year):

- a) 2018: \$96,977.50;
- b) 2019: \$95,262.91;
- c) 2020: \$118,363;
- d) 2021: \$112,791.85;
- e) 2022: \$128,422.02; and
- f) 2023: \$175,550.

[66] Ms. McDougall's actual income since 2018, also not disputed, has been as follows (Canadian dollars):

- a) 2018: \$12,462;
- b) 2019: \$27,842;
- c) 2020: \$53,459;

d) 2021: \$63,242;

e) 2022: \$24,747; and

f) 2023: \$34,799.

[67] With respect to the foregoing, it should be noted that in 2020 and 2021 Ms. McDougall's income was higher due to the CERB benefits she received during the Covid pandemic in lieu of employment income.

[68] In *Kerr v. Baranow*, 2011 SCC 10 at para. 208 and *Michel v. Graydon*, 2020 SCC 24 at para. 10, the Supreme Court of Canada has made it clear that child support is the right of the child, not of the parent seeking support on the child's behalf.

[69] Where one party seeks to impute income to the other, the burden is on the party seeking to impute income and must be based on evidence. In *Marquez v. Zapiola*, 2013 BCCA 433, D. Smith J.A. stated:

[36] For the purposes of both child and spousal support, there is a broad judicial discretion to impute income to either or both spouses. However, the party seeking to have income imputed to the other spouse has the burden of establishing an evidentiary basis for such a finding.

[70] In *C.Y.C. v. P.J.H.*, 2023 BCSC 1403, Justice Morellato helpfully summarized the applicable principles with respect to imputation:

[49] In assessing a parent's Guideline income, it is axiomatic that the court is not limited to what a party actually earns, but must also consider the party's capacity to earn income: see *Marquez v. Zapiola*, 2013 BCCA 433 at para. 37; *Van Gool v. Van Gool* (1998), 1998 CanLII 5650 (BC CA), 64 B.C.L.R. (3d) 94 (C.A.); *Barker v. Barker*, 2005 BCCA 177 at para. 19. If a party is unreasonably underemployed by not being employed in a position commensurate with their earning capacity, a court may impute income for the purposes of a support order: *Hsieh v. Lui*, 2017 BCCA 51 at para. 47.

[50] The reasons of this Court in *Hanson v. Hanson* 1999 CanLII 6307 (BC SC), [1999], B.C.J. No. 2532 (S.C.), are of considerable assistance in discerning to what extent income should be imputed to the Mother. The legal principles set out by Madam Justice Martinson in that case may be summarized as follows:

(i) Section 19(1) of the Guidelines allows the Court to impute the amount of income to a spouse as it considers appropriate in the circumstances.

(ii) Imputing income is the way in which the Court gives effect to the legal requirement that a spouse must earn what the spouse is capable of earning.

(iii) The Court must consider not only the amount of income a spouse actually earns, but "the amount of income a spouse could earn if working to capacity" (para. 9, citing *J.A.V. v. M.C.V.* (1998), 1998 CanLII 5650 (BC CA), 166 D.L.R. (4th) 528 (B.C.C.A.) at para. 28).

(iv) Bad faith is not required. The spouse required to pay child support is intentionally under-employed if that spouse chooses to earn less than he or she is capable of earning.

(v) When imputing income on the basis of intentional under-employment, a court must consider what is reasonable under the circumstances. The age, education, experience, skills and health of the spouse are factors to be considered, in addition to such matters as availability of work, freedom to relocate and other obligations.

[51] In *Marquez* at para. 37, our Court of Appeal reasoned that the test for imputing income for under-employment or unemployment is one of reasonableness, having regard to the parties' capacity to earn income in light of age, education, health, work history and work availability: see also *Zilic v. Zilic*, 2021 BCCA 107 at para. 19. In addition, our Court of Appeal (in *Watts v. Willie*, 2004 BCCA 600 at para. 16 and *Beissner v. Matheusik*, 2015 BCCA 308 at para. 44) has endorsed the factors set down by the Manitoba Court of Appeal in *Donovan v. Donovan*, 2000 MBCA 80 at para. 21, which may ground an imputation of income on the basis of underemployment or unemployment:

1. There is a duty to seek employment in a case where a parent is healthy and there is no reason why the parent cannot work. It is "no answer for a person liable to support a child to say he is unemployed and does not intend to seek work or that his potential to earn income is an irrelevant factor" (*Van Gool v. Van Gool* (1998), 1998 CanLII 5650 (BC CA), 166 D.L.R. (4th) 528 (B.C.C.A.)).
2. When imputing income on the basis of intentional under-employment, a court must consider what is reasonable under the circumstances. The age, education, experience, skills and health of the parent are factors to be considered in addition to such matters as availability of work, freedom to relocate and other obligations.
3. A parent's limited work experience and job skills do not justify a failure to pursue employment that does not require significant skills, or employment in which the necessary skills can be learned on the job. While this may mean that job availability will be at the lower end of the wage scale, courts have never sanctioned the refusal of a parent to take reasonable steps to support his or her children simply because the parent cannot obtain interesting or highly paid employment.
4. Persistence in unremunerative employment may entitle the court to impute income.
5. A parent cannot be excused from his or her child support obligations in furtherance of unrealistic or unproductive career aspirations.
6. As a general rule, a parent cannot avoid child support obligations by a self-induced reduction of income.

- [71] It is well-established that courts should also consider the party's childcare responsibilities before imputing income to that party: *K.P.O. v. C.L.O.*, 2017 BCSC 187 at para. 64 [*K.P.O.*].
- [72] Counsel for Ms. McDougall cited *A.R. v. M.E.R.*, 2022 BCSC 509, affirmed in *Roeske v. Roeske*, 2023 BCCA 358 for the proposition that, insofar as possible, retroactive support is to be determined based upon the actual income in the year for which it is due. While this is true as far as it goes, this does not in my view relieve the court of the obligation to determine whether income should be imputed on a retroactive basis where that issue is raised by one of the parties, as it has been here by Mr. Ryan.
- [73] However, that being said, I am nonetheless not persuaded that Mr. Ryan has met his evidentiary burden in this case of demonstrating that additional income should be imputed to Ms. McDougall retroactively.
- [74] Mr. Ryan argues that Ms. McDougall should have income imputed to her in the amount of \$120,000. I note at the outset that Ms. McDougall has never earned an annual income even close to that amount during her entire career as a dental hygienist. The maximum annual income she ever earned previously was \$78,233 in 2009, before she had the Children.
- [75] Mr. Ryan adduced no compelling evidence in support of the proposition that Ms. McDougall could have earned \$120,000 if working as a dental hygienist to capacity under reasonable circumstances during the period between December 2018 and June 2024. Mr. Ryan adduced copies of two recent Craigslist job postings for dental hygienists, advertising potential compensation in excess of \$60/hour for full-time positions in Vancouver but without more detail concerning expected working conditions and applicable contractual terms these postings have little evidentiary value taken alone, amounting to little more than hearsay. These current listings also do not address income-earning potential during the retroactivity period between 2018 and 2024. Further, he adduced no expert evidence in support of the proposition that Ms. McDougall could have been earning \$120,000 during the relevant period nor did he call witnesses such as dentists, dental hygienists or dental office managers to testify as to the earning potential of dental hygienists. Thus, the evidentiary basis for his argument was close to nil.
- [76] Mr. Ryan also sought to rely upon certain prior decisions of this Court in personal injury cases where courts had made factual findings concerning the potential earning capacity of plaintiffs who were dental hygienists: *Palmer v. Ansari-Hamedani*, 2019 BCSC 114 at para. 111; *C.M.G. v. R.M.G.*, 2021 BCSC 1661 at paras. 95-96 and *Grabovac v. Fazio*, 2021 BCSC 2362 at para. 279.
- [77] In my view, the factual findings in those cases are not a substitute for evidence in this case. Each case turns on its own facts and the factual findings in those cases were made in light of the individualized circumstances that pertained to each of those plaintiffs, and not Ms. McDougall's own unique circumstances. I also note that the legal and factual analysis applicable to the assessment of loss of future income in personal injury cases is different in important respects from the analysis applicable to imputation of income in family law cases.

It would be a mistake in my view to conflate the two approaches.

- [78] Accordingly, I must address Mr. Ryan's claim in light of the admissible evidence that was adduced at trial, which consisted almost solely of Ms. McDougall's testimony. In my view, this evidence from Ms. McDougall does not support a finding of a retroactive imputation of income at the \$100,000-\$120,000 level alleged by Mr. Ryan during the 2018-2024 period for at least four reasons.
- [79] First, this is not a situation where Ms. McDougall has been wilfully unemployed since 2018 or has failed to look for work. To the contrary, she has worked in a temporary position as a dental hygienist at several dental offices consistently since 2018, with the exception of the Covid pandemic period when dental offices were closed and she was laid off. She resumed working after the end of the Covid pandemic and is currently working as a dental hygienist and earning an income in that capacity. In addition, she testified that she is continuing to do 75 hours of training every year, at her own expense, to maintain her skills. Thus, she has demonstrated a continuous commitment since 2018 to work consistently where work was available and to her own perceived capacity in light of childcare commitments.
- [80] Second, there was no admissible evidence adduced at trial supporting Mr. Ryan's allegation that a dental hygienist working full-time was able to earn an income in the \$100,000-\$120,000 range in the 2018-2024 time period or moving forward. Ms. McDougall testified that she has never in her life earned an income of \$100,000-\$120,000 as a registered dental hygienist and is not aware of any of her co-workers earning an income at that level. She testified that her highest prior level of income was her 2009 income of \$78,233, before she had children, when she was "working her butt off" trying to pay her mortgage. However, she lost her job in 2011 and then had the Children, and has not had an income close to that since 2009.
- [81] Ms. McDougall testified that in her experience "full-time" for a dental hygienist is 4 days per week and 7.5 hours per day. She is unaware of anyone who works 5 days a week and 7 hours per day, and has never seen a job offered at 5 days a week. She is currently paid \$65/hour (up from \$60/hour until recently) as a temporary worker but this hourly wage entails no benefits because she is part-time. She testified that the normal full-time hourly rate for dental hygienists with benefits is in her experience in the \$52-\$55/hour range.
- [82] Applying some basic math, a hygienist working full-time 4 days per week and 7.5 hours per day for 48 weeks per year at \$55/hour would earn approximately \$80,000 per year by my calculation. This calculation is consistent with Ms. McDougall's testimony as she testified she considers her maximum income as a dental hygienist to be \$78,000-\$80,000, working full-time both weeks. Thus, at most the evidence supports the proposition that income could be attributed to Ms. McDougall at the \$80,000 level if she were reasonably expected to have been working full-time during the relevant time period.

- [83] However, and this is the third reason, it would in my view be grossly unfair to Ms. McDougall, and unreasonable under the circumstances, to impute income to her on the assumption that she should have been working full-time during the 2018-2024 period. As noted in K.P.O., the court should consider a party's childcare responsibilities before imputing income to that party. In 2018, the Children were still young, as Brighton was 7 and the twins Lachden and Avielle were 5, which was barely school age. Childcare responsibilities were significant during the 2018--2024 period, and included picking up and dropping off the Children at school, accompanying them to after-school activities, staying home with them when sick and taking them to medical, dental and other appointments. The evidence was clear in my view that Ms. McDougall had primary childcare responsibilities throughout the 2018-2024 period, with Mr. Ryan having a secondary role. For example, it was ultimately Ms. McDougall not Mr. Ryan who made sure the Children went to the doctor or dentist during that period, and scheduled the appointments, and also attended parent-teacher meetings and similar obligations.
- [84] In this case, the evidence is also undisputed that, since the Separation Date, the parties had operated under a mutually agreed parenting schedule whereby Ms. McDougall had responsibility for the Children during the weekdays from 8:30 a.m. Monday to 8:30 a.m. Friday and Mr. Ryan had them over the weekend from end of school Friday through to Monday morning. This schedule was obviously favourable to Mr. Ryan's income-earning ability, as it enabled him to work full-time during the weekdays while caring for the children on weekends. Conversely, this schedule was detrimental to Ms. McDougall's income-earning ability, as she had responsibility for the children during weekdays when she could otherwise have been working. The evidence was also that the parties had mutually agreed (which was admitted by Mr. Ryan at trial) that they did not want the Children in childcare, so this was obviously not an option for Ms. McDougall. Mr. Ryan cannot in fairness now hold this mutual agreement on avoiding childcare against Ms. McDougall in imputing income.
- [85] The net result of this agreed parenting regime was that Ms. McDougall's reasonable opportunity to work regularly was severely curtailed during the 2018-2024 period. Ms. McDougall testified that she was often (but not always) able to obtain work on Mondays, Tuesdays and Wednesdays from 9 a.m. to 2 p.m. with no break, which enabled her to drop off and pick up the Children (assuming the Children were not sick or otherwise had to be home from school). She also worked on Fridays and Saturdays from 9 a.m. to 3 p.m. when she could but she testified that the dental offices closed at 3 p.m. and obviously were not open on Sundays.
- [86] Ms. McDougall further explained that, because she is in a temporary worker position, regular shifts were not always available to her at dental offices, which tend to prefer full-time employees. Ms. McDougall explained that she was offered a full-time opportunity at one office but had to refuse that offer due to her childcare responsibilities, with the result that she was laid off from that office, which prioritized full-time over temporary employees, and had to seek a different opportunity. She also testified that she accepted a temporary

worker job at a local dental office for lower pay (\$45/hour) because it enabled her to work at an office in greater proximity to the Children and their school.

- [87] Taking the foregoing into account, the parenting arrangement agreed with Mr. Ryan meant that Ms. McDougall, by my calculation, was in a position to work at most 20 hours a week during the 2018-2024 period, which would have reduced her expected income by at least half (to approximately \$40,000). Significantly, in my view, an averaging of Ms. McDougall's actual income over the six-year period from 2018-2024 results in an annual average of approximately \$36,000, which is not far off the expected \$40,000. Further, I must take into account the fact that she was laid off at least twice during that period, which necessitated periods of unemployment while she searched for other work.
- [88] Finally, I note that during the period from 2019 to 2020, the Covid pandemic caused dental offices and schools to close, which meant Ms. McDougall was unable to work and schools were closed. During that period, Ms. McDougall had sole responsibility for the Children because Mr. Ryan was unable to cross the border. Obviously it would be grossly unfair to impute any income to her during that period, as she was unable to obtain work and had full-time childcare responsibilities (although I note that the CERB funds she received during that period are accounted for in the table support calculations, which is favourable to Mr. Ryan).
- [89] Taking all the above facts into consideration, it is not reasonable in my view to impute additional income to Ms. McDougall during the 2018-2024 period, and Mr. Ryan has failed to meet his evidentiary burden in that respect.
- [90] In closing argument, Ms. McDougall presented a child support arrears calculation, based on the respective incomes for the year 2018 to present and doing a straight set-off, as follows:
- 2018: \$1,875.00 per month for one month = \$1,875.00;
  - 2019: \$1,301 per month for 12 months = \$15,612.00;
  - 2020: January to March \$1,115.00 x three months = \$3,345.00;
  - 2020: April to December, \$2,209.00 x nine months = \$19,881.00;
  - 2021: January to April \$2,197 x four months = \$8,788.00;
  - 2021: May to December \$909.00 x eight months = \$7,272.00;
  - 2022: \$1,927.00 per month for 12 months = \$23,124.00;
  - 2023: \$2,457.00 per month for 12 months = \$29,484.00; and
  - 2024: \$2,457.00 per month for five months = \$12,285.00.
- [91] According to Ms. McDougall's evidence, the total payable by Mr. Ryan since December 2018 is \$121,666.00. Mr. Ryan has paid \$23,198.97 over that time period, with the result that arrears payable are \$98,467.03.

- [92] Mr. Ryan did not dispute the accuracy of these calculations, and instead focussed his argument on the issue of imputation. Mr. Ryan also did not draw my attention to any factors referenced in ss. 9(b) or (c) of the Guidelines which weigh in favour of a downward variation of these amounts. If anything, given the primary responsibility assumed by Ms. McDougall with respect to many aspects of the parenting regime and the significant disparity in their respective incomes, an argument for an upward variation could theoretically be made (but was not by Ms. McDougall).
- [93] Accordingly, having rejected Mr. Ryan's imputation argument with respect to retroactive support, in my view an order that Mr. Ryan pay Ms. McDougall arrears in the amount of \$98,467.03 is appropriate.
- [94] Recognizing that this is a significant sum, I will permit Mr. Ryan to make payment of arrears in instalments. Commencing September 1, 2024, and on the first of every month for the eleven following months, Mr. Ryan shall make instalment payments to Ms. McDougall on the amount of the arrears in the amount of \$8,205.59 per month. These payments shall be in addition to regular prospective child support payments as ordered below.

### Prospective Child Support

- [95] I have ordered that the parties move to a week-on, week-off parenting schedule. In contrast to the parenting arrangement during the 2018-2024 period, which favoured Mr. Ryan's income-earning capacity over that of Ms. McDougall, this new arrangement will equalize income-earning capacity between the parties. Each will be able to work full-time during weeks when the children are with the other; each will have to make arrangements to balance work and childcare during the week when the children are with them. As the parenting time between each party will be equal moving forward, s. 9 of the Guidelines applies for the calculation of child support.
- [96] In light of this new arrangement, it seems to me fair to calculate child support moving forward based on full income-earning capacity for both parties. As noted above, the law requires me to consider not only what a person actually earns but what they could earn when working to full capacity. While either party could argue that their income-earning capacity will be impaired during the weeks when the Children are with them, I note that this argument cuts both ways. If I were to notionally reduce the level of capacity for one parent I would have to equally reduce it for the other, with the result being the same on a relative basis as an assumption of full capacity.
- [97] I have found above that Ms. McDougall has the capacity to earn \$80,000 as a full-time dental hygienist, which she testified herself she considers her maximum income. Ms. McDougall actually earned close to that amount in 2009 dollars before having children, although she stated that she was "working her butt off" to pay her mortgage which indicates she was likely working more than full capacity. She also testified that since that time, she has developed work-related health issues including tennis elbow and sciatica of the hip which may restrict

her capacity to work. Taking into account the impact of inflation, it is not unfair in my view to impute income to her at the \$80,000 amount in 2024 dollars, which accounts for the above health considerations which may impact her true capacity to work.

- [98] Mr. Ryan's actual 2023 income was \$175,550. This was considerably higher than his income in 2022 (\$128,422.02) and 2021 (\$112,791.02). However, despite the variation, Mr. Ryan's 2023 income indicates that he does have the capacity to earn that income.
- [99] Since I am measuring Ms. McDougall's income at full capacity, it is fair in my view that I apply the same standard to Mr. Ryan. I am satisfied that this is a fair income for Mr. Ryan upon which prospective child support calculation should be based. Mr. Ryan testified that he is currently between jobs now but he is actively looking for work and his expectation is that he will secure new employment at a wage level comparable to his prior job.
- [100] Using the above income numbers in the applicable table, Mr. Ryan owes \$3,201 and Ms. McDougall owes \$1,619. The off-set amount is \$1,582. I was presented with no evidence at trial that this table amount is inappropriate pursuant to s. 4 of the Guidelines.
- [101] Therefore, moving forward as of June 1, 2024, Mr. Ryan shall pay the sum of \$1,582 in child support to Ms. McDougall. This order shall be reviewable commencing January 1, 2026.
- [102] Section 7 expenses shall be shared in accordance with the ratio of the incomes of the parties as set out above.

## 5. How Property should be Divided

- [103] As of the trial date, the evidence was that neither party owned or held significant assets or net worth.
- [104] In her financial statement filed March 14, 2024, Ms. McDougall reported a 2005 Honda Pilot having a value of \$1,800, an RRSP with a value of \$18,220 and her engagement ring having a USD value of \$9,650 (total assets \$29,670). She also reported health-related debts of \$19,029.78.
- [105] In his financial statement filed March 26, 2024, Mr. Ryan reported a 2015 Chevrolet Traverse with a value of \$5,000, a chequing account with a value of \$5,000 and a 401k account with a value of \$12,392.39 (total assets \$22,392.39). He reported no debts.
- [106] In terms of net worth, there was limited documentary evidence adduced at trial but it appears that, as of the trial date, Mr. Ryan's net worth exceeded that of Ms. McDougall by approximately \$10,000.
- [107] Ms. McDougall did not seek an order at trial against Mr. Ryan with respect to division of property. However, Mr. Ryan sought a division of Ms. McDougall's property in his favour based principally on his allegation that Ms. McDougall owned more assets than him at the Separation Date and that he should be entitled to an equal division of those assets based upon their valuation at that time. Mr. Ryan prepared and filed a Scott Schedule at trial

wherein he alleged that Ms. McDougall owned the Strata Property, and held certain bank and investment accounts in 2015, to which he was entitled to a share.

- [108] Mr. Ryan's alleged division of property and debts was opposed by Ms. McDougall, who took the position that there was no evidence that either party had any material net assets as of the Separation Date that were not excluded property. Ms. McDougall also took the position that the parties had agreed in the Draft MOU that each would retain their own property and debts.
- [109] Mr. Ryan at trial in turn took the position that the Draft MOU was protected by settlement privilege and was therefore inadmissible in its entirety. He testified that there had never been an agreement between the parties on division of property and debts.
- [110] In my view, Mr. Ryan's argument for a share of Ms. McDougall's property fails for at least three reasons.
- [111] First, in *Namdarpour v. Vahman*, 2019 BCCA 153, the Court of Appeal held that the valuation date for family property should be the date of trial (or date of agreement, where applicable), unless this date is found to be "significantly unfair". The Court held that a "departure from this presumptive date is effectively a reapportionment or an unequal division of family property, which can only be done under s. 95 of the FLA: *Kumagai v. Campbell Estate*, 2018 BCCA 24 at para. 76": at para. 59.
- [112] In this case, as noted above, the parties each had nominal assets at the date of trial and Mr. Ryan's net worth marginally exceeded that of Ms. McDougall. Thus, even if an order to divide assets were appropriate, Mr. Ryan would not be entitled to any redistribution from Ms. McDougall as of the trial date.
- [113] Further, Mr. Ryan made no argument that a valuation date for family property at trial was "significantly unfair" under s. 95 of the FLA nor in my view would he have succeeded on this argument if he had made it. In this respect I note that this was a relatively short marriage, that the parties largely kept their assets and financial accounts separate during the course of the marriage and that the principal asset in which Mr. Ryan seeks a share (Ms. McDougall's Strata Property) was purchased by Ms. McDougall in 2007 before the parties had even met and thus falls within the definition of excluded property under s. 85 of the FLA. Ms. McDougall testified that any money she had in accounts or real estate value as of the Separation Date was spent long ago on daily living and family expenses since that time, and that these expenditures were made necessary by Mr. Ryan's unilateral decision to cut off child support after 2018, leaving her in a difficult financial position.

- [114] Second, even if I were to accept that a departure from the presumptive valuation date was justified in this case, Mr. Ryan failed completely to adduce any documentary evidence of historical property and accounts held by Ms. McDougall or himself at the Separation Date that could even theoretically be the subject of a division in his favour, nor did he adduce any expert evidence on asset valuation that could assist the court in reaching a conclusion on division of property.
- [115] Instead, Mr. Ryan appeared to rely solely in his Scott Schedule on a list of his and Ms. McDougall's 2015 accounts and assets which he obtained directly from the Draft MOU. I pause to note here that this purported reliance upon information taken from the Draft MOU was in direct conflict with the contrary position Mr. Ryan took at trial that the Draft MOU was inadmissible and subject to settlement privilege. This is because Ms. McDougall's summary of her assets and liabilities as reflected in the Draft MOU was provided in a mediation setting.

## The Draft MOU

- [116] The evidentiary status of the Draft MOU was a matter of considerable controversy at trial due to Mr. Ryan's objection to its admissibility, and so I will address this matter briefly here. The general principle is that communications, draft agreements and settlement positions exchanged during mediations are subject to settlement privilege, but there are exceptions. In *Union Carbide Canada Inc. v. Bombardier Inc.*, 2014 SCC 35 [Union Carbide], the Supreme Court of Canada stated that a communication that "has led to a settlement will cease to be privileged if disclosing it is necessary in order to prove the existence or the scope of the settlement": at para. 35.
- [117] It was not disputed at trial that the Draft MOU was never signed and that the parties never in fact entered into a written agreement relating to their separation. However, Ms. McDougall argued, following *Union Carbide*, that the Draft MOU and subsequent correspondence between the parties relating to the Draft MOU were admissible as evidence of an oral agreement between the parties with terms and conditions that were substantially similar to those in the Draft MOU, and which the parties subsequently affirmed by course of conduct. As noted in *Voitchovsky v. Gibson*, 2022 BCCA 428 at paras. 32-34, in the context of s. 92 of the FLA, the question in such cases is what contractual intention is "objectively manifest in the parties' conduct".
- [118] Ms. McDougall argued that the parties' subsequent conduct was evidence that they had intended to be bound by the terms and conditions contained in the Draft MOU. In particular, she emphasized that:
- since 2015, the parties have abided for the most part with the same parenting schedule set out in the Draft MOU;

- Mr. Ryan paid spousal support during the three-year time frame contemplated in the Draft MOU (although in a different amount than specified under the MOU) and then ceased payments after that time, as he would have been entitled to do under the Draft MOU, which indicated that he considered that term of the Draft MOU to be binding;
- Mr. Ryan himself referred to the Draft MOU in subsequent correspondence with Ms. McDougall as the "mediation agreement" and subsequently sought to rely upon it when it suited his interests. For example, in 2018 he wrote to Ms. McDougall requesting changes to their agreement and the subject line on his emails was "amending separation agreement"; and
- Mr. Ryan in none of the communication between the parties denied the existence of an agreement between the parties.

[119] Further, with respect to division of assets, Ms. McDougall argued that sections 14-18 of the Draft MOU expressly addressed the issue of "assets and liabilities", making it clear that each party would retain what they brought into the marriage without further division. Section 14 stipulated that "the Husband shall hereafter own and possess the following assets: " followed by a list of Mr. Ryan's assets and accounts, including his investment accounts which were described as "separate excluded property". Section 15 stipulated that "the Wife shall hereafter own and possess the following assets: " followed by a list of Ms. McDougall's assets and accounts, included her Strata Property and investment accounts which were described as "separate excluded property". Ms. McDougall further argued that Mr. Ryan never questioned this arrangement in correspondence, or sought any division of property, until formal litigation was commenced in 2018, indicating that the parties had agreed on that.

[120] In my view, Ms. McDougall is correct in observing that Mr. Ryan's approach to and reliance upon the Draft MOU has been inconsistent and self-serving over the years, which did not assist his credibility at trial. The evidence was clear that it was Mr. Ryan who refused to finalize the Draft MOU after the mediation process was complete, despite initially reassuring Ms. McDougall that he wanted only to make minor changes and would do so in a timely manner. Mr. Ryan never finalized the Draft MOU thereafter and yet did not hesitate in subsequent disagreements with Ms. McDougall to rely upon terms and conditions in the Draft MOU that he considered to be beneficial to himself, and to reference this document as leverage.

[121] Now at trial, despite arguing that the Draft MOU was privileged and inadmissible, he sought in his Scott Schedule to rely upon the same list of assets that the parties had enumerated in sections 14 and 15 of the Draft MOU as his evidentiary basis for arguing the very opposite of what sections 14 and 15 were originally intended to accomplish (i.e. to ensure that each party would retain what they brought into the marriage). This was in my view an internally inconsistent and disingenuous argument.

- [122] Nonetheless, I agree with Mr. Ryan that the Draft MOU was indeed inadmissible at trial as it was subject to settlement privilege. I find that the Draft MOU could be used as evidence of a separate oral agreement on parenting time, since the parties both testified that they had an oral agreement on parenting time and manifested this same agreement through subsequent conduct. However, the subsequent conduct of the parties with respect to spousal support, child support and property division was more ambiguous and was not fully congruent with the terms in the Draft MOU. For example, Mr. Ryan paid spousal and child support for a period but in a different amount than contemplated in the MOU, and the parties were essentially silent and took no steps with respect to the issue of property division until litigation was commenced in 2018. Silence in this context was not in my view sufficient to manifest contractual intent. Thus, as there was no clear evidence of a meeting of the minds on these issues, I find that the terms and conditions in the Draft MOU pertaining to those issues are inadmissible.
- [123] However, this does not ultimately assist Mr. Ryan's argument at trial on division of assets; to the contrary, it is fatal to his claim. This is because, absent the information he sought to rely on in the Draft MOU on assets held by the parties in 2015 (which is protected by settlement privilege), the evidentiary foundation for Mr. Ryan's claim falls away completely, as he failed to adduce any independent evidence of what he and Ms. McDougall owned or owed in 2015.
- [124] In this respect, it must be noted that Mr. Ryan does not come to this Court with clean hands with respect to his disclosure of financial records. As is well known, non-disclosure of assets and financial information, in particular, has been described by the courts as the "cancer of family litigation": *Chapman v. Chapman*, 2020 BCSC 1896 at paras. 10-11. In this case, Mr. Ryan's disclosure of his own financial records was seriously inadequate, including the disclosure of the accounts, properties and business interests he held at the Separation Date or thereafter. For example, Mr. Ryan testified that for many years during and after the marriage he ran a website, which generated profits for him. However, Mr. Ryan did not disclose a single financial document in this litigation relating to the website or its value, which obviously might have been relevant to the issue of asset division. I have taken this into account in reaching my conclusion about what is fair under the circumstances.
- [125] The third reason why Mr. Ryan's argument for a share of Ms. McDougall's assets fails is that I am not convinced on the evidence that there was any significant equity in the Strata Property (which was Ms. McDougall's principal asset at the Separation Date), or in Ms. McDougall's bank and investment accounts, to which Mr. Ryan could be entitled even if he had adduced evidence with respect to asset valuation.
- [126] To the extent that Ms. McDougall purchased the Strata Property before her relationship with Mr. Ryan had commenced, it was clearly excluded property. In *Tereposky v. Fooks*, 2023 BCSC 1989, Justice Stephens explained the principles applicable to excluded property:

- [36] Property acquired by a spouse before the relationship is considered "excluded property" under s. 85(1)(a) of the FLA, except amounts by which excluded property has increased in value since the start of the relationship (FLA, s. 84(2)(g)). Practically, the increase in value is determined by comparing the excluded property's value (less any debts registered against or encumbering title to the property) at the time the relationship began and the value at the date of the hearing. Each spouse is presumptively entitled to 50% of the increase in value: *S.L.M.W. v. M.R.G.W.*, 2016 BCSC 272 at paras. 67, 69-71.
- [127] Ms. McDougall eventually sold the Strata Property three years after the Separation Date for \$267,900, which represented a capital gain of about \$40,000. From the proceeds of the sale, Ms. McDougall had to pay \$198,127.80 to discharge the mortgage and a sum of \$20,000 to her stepfather which he had given as a loan at the time of the purchase. Thus, at best, Ms. McDougall estimated that she may have cleared \$20,000 in 2017 after repayment of all the outstanding debts.
- [128] However this sale took place three years after the Separation Date. At the Separation Date, which is the date on which Mr. Ryan seeks an asset division, there was persuasive evidence that the market value of the Strata Property had not increased above the original purchase price. To the contrary, Ms. McDougall adduced evidence at trial that, at the Separation Date, the assessed value of the Strata Property was actually below the original purchase price (\$190,400), and therefore in a negative equity position. She also adduced evidence of the sale of a comparable unit in her building on August 21, 2014 for a price of \$197,000, which was below the original 2007 purchase price of \$200,000 and considerably less than her own purchase price. Further, the evidence from BC Assessment Property Notices adduced at trial was that the assessed value of her Strata Property remained flat and below the original purchase price from 2013-2016, until it finally rose by 17% in 2017, presumably due to market forces.
- [129] To the extent that this sudden rise in value occurred three years after the Separation Date it would be significantly unfair in my view for Mr. Ryan to share in that market rise, particularly since there was no evidence that Mr. Ryan ever contributed to the cost of the mortgage, taxes or the maintenance of the property after he moved out in 2015.
- [130] With respect to Ms. McDougall's bank and investment accounts at the Separation Date, there was no evidence at all at trial as to whether those accounts were in a positive equity position nor, as mentioned above, did Mr. Ryan adduce sufficient evidence concerning his own financial holdings at the time to justify an unfairness finding in his favour.
- [131] For all the above reasons, I conclude that Mr. Ryan's claim for a share of Ms. McDougall's assets should be dismissed. There was simply insufficient evidence adduced at trial upon which such an order could theoretically be made and, in any event, the evidence that was adduced did not support the proposition that Ms. McDougall at any material time had assets with a greater value than Mr. Ryan to which he would be entitled to a share.

## V. Order

[132] In summary, I make the following orders:

- a) The parties' request for a divorce under the DA is hereby granted, taking effect 31 days from the date of this judgment;
- b) The parties shall have joint guardianship of the Children;
- c) The parties shall share decision-making responsibility with respect to the Children and will make a good faith effort to make such decisions jointly. In the event of a decision that cannot be resolved jointly in good faith, Ms. McDougall shall have the discretion to make the final decision. Mr. Ryan shall be at liberty to bring an application to challenge that decision in court;
- d) Commencing on September 1, 2024, the parties shall share parenting time on a week-on, week-off basis with drop offs to take place at the Childrens' school on Mondays at 8:30 a.m. and pickups at the end of the Monday school day;
- e) Holiday parenting time will be shared on a week-on, week-off basis. To the extent that there is conflict about which weeks over Christmas and Spring Break should be allocated to which parent, the first choice on preferred weeks will be alternated every other year. In the 2024-2025 school year, Mr. Ryan will have the first week of Christmas and Spring Break and Ms. McDougall will have the second. In the following year the order will be reversed, and alternated thereafter.
- f) The parents will share summer parenting time on a week-on, week-off basis with the exception that each parent shall be entitled to a continuous three-week block of time with the Children over the summer. If there is a conflict over scheduling the three-week blocks, then priority for one parent's scheduling preference will be alternated every other year, with the parents being required to mutually communicate their scheduling preferences to each other no later than April 1 of each year. Ms. McDougall will have the first choice during the summer of 2025 and Mr. Ryan will have the first choice in the summer of 2026, with first choice alternating thereafter.
- g) Ms. McDougall's claim for retroactive child support is granted in the amount of \$98,467.03. Commencing September 1, 2024, and for the following 11 months, Mr. Ryan shall make instalment payments on the amount of the arrears in the amount of \$8,205.59 per month.
- h) On a prospective basis, commencing June 1, 2024 and on the 1st of every month thereafter, Mr. Ryan shall make support payments to Ms. McDougall in the amount of \$1,582. This order shall be reviewable commencing January 1, 2026. The arrears that have accumulated for June-August, 2024 pending release of this decision will be payable on September 1, 2024;
- i) Mr. Ryan's claim for a division of Ms. McDougall's assets in his favour is dismissed.

[133] The parties have leave to speak to the issue of costs.

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"M. Taylor J."

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